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Counsel for Plaintiff

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EDL

PHYSICIANS HEALTHSOURCE, INC., an  
Ohio corporation, individually and as  
the representative of a class of similarly-  
situated persons,

Plaintiff,

v.

RELIANT TECHNOLOGIES, INC., SOLTA  
MEDICAL, INC., and JOHN DOES 1-  
10,

Defendants.

C V No. 12 2180

CLASS ACTION COMPLAINT

FILED E-1111

2012 MAY -1 P 3:30

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CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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1 Plaintiff Physicians Healthsource, Inc. ("Plaintiff") brings this action on behalf of itself and  
 2 all other persons similarly situated, through its attorneys, and except as to those allegations  
 3 pertaining to Plaintiff or its attorneys, which allegations are based upon personal knowledge, alleges  
 4 the following upon information and belief against Defendants, Reliant Technologies, Inc., Solta  
 5 Medical, Inc. and John Does 1-10 ("Defendants").

#### 6 **PRELIMINARY STATEMENT**

7 1. This case challenges Defendants' practice of sending unsolicited facsimiles.

8 2. The federal Telephone Consumer Protection Act, 47 USC § 227 ("TCPA"), prohibits  
 9 a person or entity from faxing or having an agent fax advertisements without the recipient's prior  
 10 express invitation or permission. The TCPA provides a private right of action and provides statutory  
 11 damages of \$500 per violation.

12 3. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its  
 13 fax machine, paper, and ink toner. An unsolicited fax wastes the recipients' valuable time that  
 14 would have been spent on something else. A junk fax interrupts the recipients' privacy. Unsolicited  
 15 faxes prevent fax machines from receiving authorized faxes, prevent their use for authorized  
 16 outgoing faxes, cause undue wear and tear on the recipients' fax machines, and require additional  
 17 labor to attempt to discern the source and purpose of the unsolicited message.

18 4. On behalf of itself and all others similarly situated, Plaintiff brings this case as a class  
 19 action asserting claims against Defendants under the TCPA.

20 5. Plaintiff seeks an award of statutory damages for each violation of the TCPA and for  
 21 injunctive relief.

#### 22 **JURISDICTION AND VENUE**

23 6. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. §  
 24 227.

25 7. Venue is proper in the Northern District of California because Defendants committed  
 26 a statutory tort within this district, a significant portion of the events took place here, and Defendants  
 27 have their principal place of business here.  
 28

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**PARTIES**

8. Plaintiff Physicians Healthsource, Inc. is an Ohio corporation located in Cincinnati, Ohio.

9. On information and belief, defendant Reliant Technologies, Inc. is a Delaware corporation with its principal place of business in Hayward, California.

10. On information and belief, defendant Solta Medical, Inc. is a Delaware corporation with its principal place of business in Hayward, California.

11. Defendants John Does 1-10 will be identified through discovery, but are not presently known.

**FACTS**

12. On or about June 19, 2008 and July 22, 2008, Defendants transmitted by telephone facsimile machine two unsolicited faxes to Plaintiff. Copies of the faxes are attached hereto as Exhibit A.

13. Defendants created or made Exhibit A which Defendants knew or should have known is a good or product which Defendants intended to and did in fact distribute to Plaintiff and the other members of the class.

14. Exhibit A is part of Defendants' work or operations to market Defendants' goods or services which were performed by Defendants and on behalf of Defendants. Therefore, Exhibit A constitutes material furnished in connection with Defendants' work or operations.

15. Plaintiff had not invited nor given permission to Defendants to send the faxes.

16. On information and belief, Defendants faxed the same and similar unsolicited facsimiles to Plaintiff and more than 39 other recipients without first receiving the recipients' express permission or invitation.

17. There is no reasonable means for Plaintiff (or any other class member) to avoid receiving unauthorized faxes. Fax machines are left on and ready to receive the urgent communications their owners desire to receive.

18. Defendants' facsimiles did not display a proper opt out notice as required by 64 C.F.R. 1200.

**TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227**

19. In accordance with FRCP 23, Plaintiff brings this action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the following class of persons:

All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendants, (3) from whom Defendants did not obtain prior express permission or invitation to send those faxes, (4) with whom Defendants did not have an established business relationship, and (5) which did not display a proper opt out notice.

Excluded from the Class are Defendants, their employees, agents and members of the Judiciary.

20. Commonality [Fed. R. Civ. P. 23 (A) (2)]: Common questions of law and fact apply to the claims of all class members. Common material questions of fact and law include, but are not limited to, the following:

- a) Whether Defendants sent unsolicited fax advertisements;
- b) Whether Defendants' faxes advertised the commercial availability of property, goods, or services;
- c) The manner and method Defendants used to compile or obtain the list of fax numbers to which they sent Exhibit A and other unsolicited faxed advertisements;
- d) Whether Defendants faxed advertisements without first obtaining the recipients' prior permission or invitation;
- e) Whether Defendants sent the faxed advertisements knowingly;
- f) Whether Defendants violated the provisions of 47 U.S.C. § 227;
- g) Whether Defendants should be enjoined from faxing advertisements in the future;
- h) Whether Plaintiff and the other members of the class are entitled to statutory damages;
- i) Whether Exhibit A and Defendant's other advertisements display a proper opt out notice as required by 64 C.F.R. 1200; and
- j) Whether the Court should award treble damages.



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21. Typicality [Fed. R. Civ. P. 23 (A) (3)]: Plaintiff's claims are typical of the claims of all class members. Plaintiff received a fax sent on behalf of Defendants advertising goods and services of Defendants during the Class Period. Plaintiff is making the same claims and seeking the same relief for itself and all class members based upon the same federal statute. Defendants have acted the same or in a similar manner with respect to the Plaintiff and all the class members.

22. Fair and Adequate Representation [Fed. R. Civ. P. 23 (A) (4)]: Plaintiff will fairly and adequately represent and protect the interests of the class. It is interested in this matter, has no conflicts and has retained experienced class counsel to represent the class.

23. Need for Consistent Standards and Practical Effect of Adjudication [Fed R. Civ. P. 23 (B) (1)]: Class certification is appropriate because the prosecution of individual actions by class members would: a) create the risk of inconsistent adjudications that could establish incompatible standards of conduct for Defendants, and/or b) as a practical matter, adjudication of Plaintiff's claims will be dispositive of the interests of class members who are not parties.

24. Common Conduct [Fed. R. Civ. P. 23 (B) (2)]: Class certification is also appropriate because Defendants have acted and refused to act in the same or similar manner with respect to all class members thereby making injunctive and declaratory relief appropriate. Plaintiff demands such relief as authorized by 47 U.S.C. §227.

25. Predominance and Superiority [Fed. R. Civ. P. 23 (B) (3)]: Common questions of law and fact predominate and a class action is superior to other methods of adjudication:

- a) Proof of the claims of Plaintiff will also prove the claims of the class without the need for separate or individualized proceedings;
- b) Evidence regarding defenses or any exceptions to liability that Defendants may assert and prove will come from Defendants' records and will not require individualized or separate inquiries or proceedings;
- c) Defendants have acted and are continuing to act pursuant to common policies or practices in the same or similar manner with respect to all class members;
- d) The amount likely to be recovered by individual class members does not support individual litigation. A class action will permit a large number of relatively small claims

1 involving virtually identical facts and legal issues to be resolved efficiently in one  
 2 proceeding based upon common proofs;

3 e) This case is inherently manageable as a class action in that:

4 (i) Defendants identified persons or entities to receive the fax transmissions and  
 5 it is believed that Defendants' computer and business records will enable the Plaintiff  
 6 to readily identify class members and establish liability and damages;

7 (ii) Liability and damages can be established for Plaintiff and the class with the  
 8 same common proofs;

9 (iii) Statutory damages are provided for in the statute and are the same for all class  
 10 members and can be calculated in the same or a similar manner;

11 (iv) A class action will result in an orderly and expeditious administration of  
 12 claims and it will foster economics of time, effort and expense:

13 (v) A class action will contribute to uniformity of decisions concerning  
 14 Defendants' practices; and

15 (vi) As a practical matter, the claims of the class are likely to go unaddressed  
 16 absent class certification.

17 26. The TCPA makes unlawful the "use of any telephone facsimile machine, computer or  
 18 other device to send an unsolicited advertisement to a telephone facsimile machine..." 47 U.S.C. §  
 19 227.

20 27. The TCPA defines "unsolicited advertisement" as "any material advertising the  
 21 commercial availability or quality of any property, goods, or services which is transmitted to any  
 22 person without that person's express invitation or permission." 47 U.S.C. § 227 (a) (4).

23 28. The TCPA provides:

24 "3. Private right of action. A person may, if otherwise permitted by the laws or rules  
 25 of court of a state, bring in an appropriate court of that state:

26 (A) An action based on a violation of this subsection or the regulations prescribed  
 27 under this subsection to enjoin such violation;  
 28

1 (B) An action to recover actual monetary loss from such a violation, or to receive  
2 \$500 in damages for each such violation, whichever is greater, or

3 (C) Both such actions.”

4 29. The TCPA is a strict liability statute, so Defendants are liable to Plaintiff and the  
5 other class members even if its actions were only negligent.

6 30. Defendants knew or should have known that a) Plaintiff and the other class members  
7 had not given express invitation or permission for Defendants or anybody else to fax advertisements  
8 about Defendants’ goods or services; b) Plaintiff and the other class members did not have an  
9 established business relationship; c) Defendants transmitted an advertisement; and d) Defendants’  
10 faxes did not display a proper opt out notice compliant with 64 C.F.R. 1200.

11 31. Defendants’ actions caused damages to Plaintiff and the other class members.  
12 Receiving Defendants’ junk faxes caused the recipients to lose paper and toner consumed in the  
13 printing of Defendants’ faxes. Moreover, Defendants’ faxes used Plaintiff’s fax machine.  
14 Defendants’ faxes cost Plaintiff time, as Plaintiff and its employees wasted their time receiving,  
15 reviewing and routing Defendants’ illegal faxes. That time otherwise would have been spent on  
16 Plaintiff’s business activities. Defendants’ faxes unlawfully interrupted Plaintiff’s and other class  
17 members’ privacy interests in being left alone. Finally, the injury and property damage sustained by  
18 Plaintiff and the other class members from the sending of Defendants’ advertisements occurred  
19 outside of Defendants’ premises.

20 32. Defendants violated 47 U.S.C. § 227, et seq., by transmitting advertisements to the  
21 Plaintiff and the other members of the class without obtaining their prior express permission or  
22 invitation.

23 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, demands  
24 judgment in its favor and against Defendants, Reliant Technologies, Inc., Solta Medical, Inc., and  
25 John Does 1-10, jointly and severally, as follows:

26 A. That the Court adjudge and decree that the present case may be properly maintained  
27 as a class action, appoint Plaintiff as the representative of the class and appoint Plaintiff’s counsel as  
28 counsel for the class;

1 B. That the Court award actual monetary loss from such violations or the sum of five  
2 hundred dollars (\$500.00) for each violation, whichever is greater;

3 C. That the Court treble the damages if the Court finds that Defendants willfully,  
4 knowingly or intentionally violated the Telephone Consumer Protection Act;

5 D. That the Court enjoin Defendants from additional violations; and

6 E. That the Court award costs and such further relief as the Court may deem just and  
7 proper.

8  
9 Dated: May 1, 2012

10 PHYSICIANS HEALTHSOURCE, INC., an Ohio  
11 corporation, individually and as the representative of a  
12 class of similarly-situated persons,

13  
14 By:   
15 ROBERT C. SCHUBERT  
16 WILLEM F. JONCKHEER  
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24 Local Counsel for Plaintiff

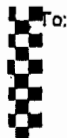
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Counsel for Plaintiff

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# **EXHIBIT A**



JUN 19 2008



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Discussion / Demonstration 9:30 am

#### WHERE:

Indianapolis Marriott - North  
3645 River Crossing Parkway  
Indianapolis, IN 46240

#### EVENT HOST:

Brent McGough  
brmcgough@fraxel.com  
614.325.5237

**KEYNOTE SPEAKER:** Jill Walbel, MD

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**Space is limited, register early. Upon registration, you will receive event confirmation and your  
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614.325.5237  
bmcgough@fraxel.com

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